MARKO AND YARROW LEWIS

IBLA 80-69 Decided March 27, 1980

Appeal from decision of the Alaska Townsite Trustee, Bureau of Land Management, that no settlement rights under the Alaska townsite laws can be commenced since the enactment of Federal Land Policy and Management Act of 1976.

Affirmed.

1. Estoppel -- Federal Employees and Officers: Authority to Bind Government

   The general rule is that reliance on erroneous or incomplete information provided by Federal employees cannot create any rights not authorized by law.

2. Alaska: Townsites -- Federal Land Policy and Management Act of 1976: Repealers -- Townsites

   The Alaska townsite laws, 43 U.S.C. §§ 732-736 (1970), were repealed by the Federal Land Policy and Management Act of 1976, sec. 703(a), 90 Stat. 2789. The initiation of an occupancy claim, pursuant to the townsite laws, after the effective date of FLPMA, Oct. 21, 1976, does not constitute a valid existing right.

APPEARANCES: Marko Lewis and Yarrow Lewis, pro sese.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

Marko and Yarrow Lewis appeal from a letter decision of the Alaska Townsite Trustee (Trustee), Bureau of Land Management (BLM), holding that appellants had no rights under the Alaska townsite laws,

43 U.S.C. §§ 732-736 (1970), since occupancy of the townsite lots commenced after the repeal of the townsite laws by the Federal Land Policy and Management Act of 1976 (FLPMA), 90 Stat. 2789-2790, 43 U.S.C. § 1701 (1976), October 21, 1976.

By letters received by the Trustee on May 12 and May 26, 1978, appellants informed the Trustee that they had staked claims in Block 31, Hyder Townsite. The letters contained hand drawn maps and descriptions of the claims.

By letter of May 31, 1978, the Trustee responded:

> Your letters describing improvements and staking of a site in unsubdivided Block 31, U.S. Survey 1428 extension, have been received. You may proceed to develop and enjoy use of the sites. Before title in the form of a Trustee Deed can be issued to you, the Bureau of Land Management must make a subdivisional survey and have the plat of survey approved in Washington, D.C.

In August of 1979 appellant Marko Lewis and the Trustee exchanged letters discussing the Alaska Regional Solicitor's opinion of February 20, 1979, concerning the effect of the repeal of the townsite laws by the enactment of the Federal Land Policy and Management Act of October 21, 1976. The opinion concluded in part:

> The October 21, 1976 repeal of the townsite laws was clearly of the latter type -- to destroy rights in the future. Existing rights were expressly saved by Section 701(a) which provides in pertinent part:
>
> > "Nothing in this Act * * * shall be construed as terminating any * * * land use right * * * existing on the date of approval of this Act."
>
> The rights in existence on the date of repeal were the rights of individuals then in occupancy and the right of the municipality to any unoccupied lands. Persons not in occupancy on that date had no rights "existing on the date of approval of this Act." Therefore the repeal in effect closed all townsites to further entry.

Appellants filed a notice of appeal received by the Trustee on October 17, 1979, apparently challenging the Trustee's failure to definitively state whether appellants were entitled to the property.

On October 24, 1979, the Trustee sent the appellants a copy of this Board's decision in Stu Mach, 43 IBLA 306 (1979). The cover letter stated: "This decision pertains to all such claims including

yours. Therefore your appeal is not being forwarded to the Board of Land Appeals." The Trustee subsequently forwarded the appeal to this Board. 1/

Appellants contend on appeal that in 1976-1978 they received information from the Trustee that listed the requirements and townsites available for settlement under the Trustee's jurisdiction. Appellants allege that a cabin has been built on each site. One of the cabins is said to be valued at $10,000. Appellants contend they are entitled to settlement of the sites for two reasons: (1) The exchange of letters with the Trustee created a contract binding on the Government; (2) Hyder is not a municipality which could acquire rights under the Townsite Acts leaving the Trustee free to dispose of the land by awarding it to the appellants.

[1] Appellants' assertion of a binding contract is in effect an argument that the Trustee should be estopped from rejecting the claims. Appellants relied upon the Trustee's statement in the May 31, 1978, letter that they "may proceed to develop and enjoy use of the sites." In our recent resolution of an appeal involving almost identical circumstances and issues, Royal Harris, 45 IBLA 87 (1980), the appellant also relied upon the Trustee's statements and as in the instant case proceeded to construct a residence on the site. In Royal Harris we said:

> It is well settled law that the Department can alienate interests in land belonging to the United States only within the limits authorized by law. Union Oil Co. of California v. Morton, 512 F.2d 743, 748 (9th Cir. 1975).
>
> William J. Elder and Stephen M. Owen, 56 Comp. Gen. 85, 89 (1976), illuminates the principle above as follows:
>
> > There is no doubt that Federal employees, and ordinary citizens, are presumed to know the contents of the United States Code. Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380 (1947).
> >
> > We believe the rule stated by the Supreme Court in Utah Power & Light Co. v. United States, 243 U.S. 389 (1917), is still correct:

1/ The Trustee did not formally hold, as to these appellants, that no settlement rights can be commenced under the Alaska townsite laws since the enactment of the Federal Land Policy and Management Act of 1976. It is evident by the Trustee's letters, actions, and reference to Stu Mach, 43 IBLA 306 (1979), that his intent was to so decide. This appeal will be treated on its merits as if a formal decision had issued.

> * * * that the United States is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit. (243 U.S. at 409)

This position was restated and followed in Montilla v. United States, 457 F.2d 978 (Ct. Cl. 1972). In that case, the plaintiff was seeking retired pay for service in the Army Reserves. He contended that the Government was estopped to deny him benefits based upon insufficient years of service in the active reserves, because he had relied on statements and letters from Army officials stating, or at least inferring, that he had enough service in the active reserves. In holding that the statutory service requirements must be strictly fulfilled, the court stated that:

> It is true that the government may be estopped by the acts and conduct of its agents where they are duly authorized and are acting within the scope of their authority and in accordance with the power vested in them, as, for instance, in certain cases involving contractual dealings with the government. But we know of no case where an officer or agent of the government, such as Colonel Powell of the Army in the case before us, has estopped the government from enforcing a law passed by Congress. Unless a law has been repealed or declared unconstitutional by the courts, it is a part of the supreme law of the land and no officer or agent can by his actions or conduct waive its provisions or nullify its enforcement. (457 F.2d at 986-987)

[2] The assertion that Hyder is not a municipality which could acquire rights under the Townsite Act, does not create a right of occupancy in appellants. In Royal Harris, supra, we said:

> [T]his statute, as well as the other townsite laws, was repealed by section 703 of FLPMA, 90 Stat. 2790. The

> question then becomes whether appellant has a valid existing right under section 701 of FLPMA, which provides that nothing in the Act shall be construed as terminating any patent, or other land use right or authorization existing on the date of approval of the Act (Oct. 21, 1976). The events giving rise to this appeal postdate the effective date of the Act. Therefore, on October 21, 1976, appellant could have had no valid existing right which would survive FLPMA. Stu Mach, 43 IBLA 306 (1979). When appellant wrote to BLM on May 9, 1977, he had only a hope or expectancy. However, use or occupancy of the public land granted subsequent to the effective date of FLPMA must be under authority of that Act, 43 U.S.C. § 1732(b) (1976); William J. Coleman, 40 IBLA 180 (1979), and the erroneous advice provided by BLM could create no rights not authorized by law. Belton E. Hall, 33 IBLA 349 (1978).

Whether the entity of Hyder could or could not acquire rights under the townsite laws is irrelevant to the issue of whether appellants acquired any rights. We hold that appellants acquired no such rights by virtue of post-FLPMA construction of improvements and occupancy.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the matter appealed from is affirmed.

Frederick Fishman
Administrative Judge

I concur:

Edward W. Stuebing
Administrative Judge

ADMINISTRATIVE JUDGE GOSS CONCURRING:

The record does not show when the Townsite Trustee's letter of August 28, 1979, was received by appellants. If receipt was prior to September 17, 1979, then the "notice of appeal" received by the Townsite Trustee on October 17, 1979, was not timely. On October 24, 1979, however, the Townsite Trustee wrote Marko Lewis and stated that Stu Mach, 43 IBLA 306 (1979), applied to the Lewis claim. Again, the record does not show when appellants received the Trustee's letter. Appellants have filed a second notice of appeal, but this was transmitted to the Board of Land Appeals. It was received November 20.

Under 43 CFR 4.411 appellants should have filed the November 20 appeal with the officer who made the decision. The appeal was filed with the Board somewhat in advance of the deadline. While it would have been more proper for the Townsite Trustee to issue a formal decision, and for appellants to strictly comply with regulations, it is within Board jurisdiction to consider the appeal in this instance. Cf. Julie Adams, 45 IBLA 252 (1980).

Appellants' allege that Hyder is not a municipality and that they should therefore now receive title from the Trustee. Such argument should be first presented to the State Office, together with references as to the legal authority by which appellants claim a conveyance could presently be made.

Subject to the above comments, I concur in the main decision herein.

Joseph W. Goss
Administrative Judge